No. 273

In the Supreme Court of the United States

OCTOBER TERM, 1957

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL–CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

JEROME D. FENTON,
General Counsel,
STEPHEN LEONARD,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
NORTON J. COME,
Attorney,
National Labor Relations Board, Washington 25, D. C.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. ——

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL–CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, issued May 9, 1957, setting aside the Board order issued against respondent union.

OPINIONS BELOW

The opinion of the court below (Appendix, *infra*, pp. 10–22) is not yet reported. The findings of fact, conclusions of law, and order of the Board (R. 63–67, 26–61)[1] are reported at 115 N. L. R. B. 800.

JURISDICTION

The judgment of the court below (Appendix, *infra*, pp. 23–24) was entered on May 9, 1957, and its decree (Appendix, *infra*, pp. 24–27) issued on June 7, 1957.

[1] "R" references are to the Joint Appendix filed in the court below.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and under Section 10 (e) of the National Labor Relations Act, as amended, 61 Stat. 147, 29 U. S. C. 160 (e).

QUESTION PRESENTED

Whether union inducement of employees not to handle or work on goods, which would otherwise be proscribed as a secondary boycott by Section 8 (b) (4) (A) of the National Labor Relations Act, as amended, is lawful because the employer and the union have agreed by contract that the employees shall not be required to handle "unfair goods."

STATUTE INVOLVED

The pertinent provision of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151 *et seq.*), is as follows:

> SEC. 8 (b). It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufac-

turer, or to cease doing business with any other person; * * *

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On September 15, 1954, Local 850 of the International Association of Machinists, bargaining representative of the production and maintenance employees of the American Iron and Machine Works, called a strike at, and commenced to picket, the Company's three plants in Oklahoma City, Oklahoma (R. 31; 128–130). The picketing deterred the five trucking firms[2] normally servicing American Iron from making pick-ups and deliveries at its premises. Thereupon, American Iron hauled its freight in its own trucks to the Oklahoma City loading platforms of the trucking firms for shipment (R. 32; 118).

The Machinists followed the American Iron trucks to the premises of the carriers and picketed them while they remained there (R. 32; 124–125). In addition to engaging in such picketing activity, the Machinists expressly requested employees of the motor carriers not to handle American Iron freight (R. 37–40; 111, 123–124, 137, 159–160).

Respondent General Drivers, Local No. 886, hereafter called the Teamsters, was the collective bargaining representative of the employees of the motor car-

---

[2] Santa Fe Trail Transportation Co.; Gillette Motor Transport; Time, Inc.; D. C. Hall Transportation Co.; and Lee Way Motor Freight Lines. These are common carriers for hire engaged in the interstate business of hauling freight by motor vehicle, under licenses from the Interstate Commerce Commission (R. 3, 9).

riers. Its contract with each of the carriers contained the following "hot cargo" clause (R. 41–42; 140, 187):

ARTICLE 4

* * * * *

(b) Members of the Union shall not be allowed to handle or haul freight to or from an unfair company, provided this is not a violation of the Labor Management Relations Act of 1947.

Invoking this clause, agents of the Teamsters directed the carriers' employees to cease handling American Iron freight. In each instance, except that involving the Lee Way Motor Freight Lines, the employer had ordered the employees to handle the freight, and in every instance the employees, after receiving instructions from the Union, refused to do so (R. 49–57).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board, with two members dissenting, concluded that the Teamsters' appeals to the carriers' employees not to handle American Iron freight were violative of Section 8 (b) (4) (A) of the Act, notwithstanding the "hot cargo" clause in the Teamsters' contracts with the carriers. Two members of the Board majority, adopting the view expressed in the earlier *Sand Door* case, 143 N. L. R. B. 1210,[3] held as follows (R. 64):

> As stated in the principal opinion in that case, regardless of the existence of a "hot cargo"

[3] Enforced, *sub nom. National Labor Relations Board* v. *Local 1976, United Brotherhood of Carpenters*, 241 F. 2d 147 (C. A. 9), petition for certiorari pending, No. 999, this Term.

> clause, any direct appeal by a union to engage in a strike or concerted refusal to handle a product is proscribed by the Act when one of the objectives set forth in Section 8 (b) (4) (A) is present. Thus, while Section 8 (b) (4) (A) does not forbid the execution of a hot cargo clause or a union's enforcement thereof by appeals to the employer to honor his contract, the Act does, in our opinion, preclude enforcement of such clause by appeals to employees, and this is so whether or not the employer acquiesces in the union's demand that the employees refuse to handle "hot" goods * * *

The third member of the Board majority held that the "hot cargo" clause served as no defense to a violation of Section 8 (b) (4) (A) because it was contrary to public policy (R. 67).

The Board, with two members dissenting, further concluded that the Machinists' picketing and allied activities at the carriers' docks were likewise violative of Section 8 (b) (4) (A). The Board rejected the Machinists' contentions that their activity at the docks was merely an incident of legitimate primary activity directed against American Iron, and that the activity was, in any event, lawful by virtue of the "hot cargo" clause in the Teamsters' contracts with the carriers (R. 65).

The Board entered an order requiring the Teamsters and the Machinists to cease and desist from the unfair labor practices found, and to post appropriate notices (R. 65–67).

C. THE DECISION OF THE COURT BELOW

The court below (with one judge dissenting on each part of the case) set aside the Board order against the respondent Teamsters and enforced the Board order against the Machinists (Appendix, *infra*, pp. 10–22). The court held that Section 8 (b) (4) (A) did not affect the validity of "hot cargo" agreements as such, and, accepting this premise, "it is hard to see how it can be said that, simply because the employees do what they have the right to do, there was a strike or refusal to work" (p. 13). Accordingly, the court concluded that the Teamsters' enforcement of their "hot cargo" agreements with the carriers by appeals to the carriers' employees was not in violation of Section 8 (b) (4) (A). However, the court further concluded that the Machinists' picketing and related activity at the carriers' docks was violative of Section 8 (b) (4) (A), for, since the Machinists was neither a party to, nor a third party beneficiary of, the Teamsters' contracts, these contracts could not make lawful the Machinists' secondary activities.

REASONS FOR GRANTING THE WRIT

1. The holding of the court below that Section 8 (b) (4) (A) of the Act, outlawing secondary boycotts, does not reach union appeals to employees not to handle a product where there is a "hot cargo" agreement between the union and the employer presents a question on which the Courts of Appeals are divided. The decision below is, on the one hand, in direct conflict with the holding of the Ninth Circuit in *National Labor Relations Board* v. *Local 1976, United Brother-*

hood of Carpenters, 241 F. 2d 147, and with the views expressed by the Sixth Circuit in *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters*, 242 F. 2d 932 and, on the other hand, in accord with the holding of the Second Circuit in *Milk Drivers and Dairy Employees Local Union No. 338* v. *National Labor Relations Board*, decided June 19, 1957, 40 LRRM 2279. Cf. *Rabouin d/b/a Conway's Express* v. *National Labor Relations Board*, 195 F. 2d 906, 912 (C. A. 2). The union has filed a petition for certiorari in the *Local 1976* case, No. 999, this Term, and the Board does not oppose the granting of that petition. For this conflict to be fully resolved, it would appear appropriate for this Court to review the instant case also.

2. The question presented is of major importance in the administration of the Act. The kind of contract clause involved in this case, popularly termed a "hot cargo" clause, is extensively used in the labor-management field,[4] and the conclusion that such a clause provides a valid defense to a Section 8 (b) (4) (A) violation would have the effect of insulating from the regulatory control of the Act a substantial amount of secondary boycott activity.

3. The holding of the court below is erroneous. It rests on the premise that Section 8 (b) (4) (A) of the Act was enacted only for the benefit of the secondary employer whose employees have been induced by

[4] Collective Bargaining Negotiations and Contracts (Bureau of National Affairs, Washington, D. C.) pp. 77:5, 77:352–353; Collective Bargaining Provisions, Strikes and Lock-Outs; Contract Enforcement, Bulletin No. 903–13 (U. S. Dept. of Labor, 1949), pp. 37–43.

the union not to handle or work on the goods or commodities of another employer (pp. 14-15, *infra*). But the legislative history of the Act shows that the provision was enacted also for the protection of other employers and persons affected by a secondary boycott, including the public generally.[8] And this is confirmed by the language of Section 8 (b) (4) (A) itself, which defines the illegal object of picketing or strike activity proscribed therein in terms of "forcing or requiring * * * *any employer or other person* * * * to cease doing business with any other person." [Italics added.] It seems unlikely that Congress intended that the applicability of the Section should turn on whether the particular employer whose employees were induced did or did not have a "hot cargo" agreement with the union. To hold, as did the court below, that this employer's prior acquiescence makes a difference, is to fail to give full protection to the other interests sought to be safeguarded by the Section, without the consent of the persons affected. See *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters*, 242 F. 2d 932, 936 (C. A. 6).

Nor is a different conclusion required, as the court below thought, by the language of Section 8 (b) (4) (A) which bans only two types of union inducement—inducing employees to "strike," or to engage in a "concerted refusal in the course of their employment" to

[8] See Leg. Hist. of the Labor-Management Relations Act, 1947 (Gov't Print. Off., 1948), pp. 414, 583, 1107-1108, 1354, 1375; *National Labor Relations Board* v. *Local 1976, United Brotherhood of Carpenters*, 241 F. 2d 147, 155 (C. A. 9); *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters*, 242 F. 2d 932, 936 (C. A. 6).

handle goods. In the light of the broad purpose of the Section, the terms "strike" and "concerted refusal" should be construed to cover any union induced employee refusal to work, irrespective of the prior acquiescence of the employer. Moreover, the phrase "in the course of employment" is not properly to be interpreted as a reference to the work tasks which the employer has hired his employees to perform since, if so used, the parties could give legality to many acts forbidden by the statute by the device of fixing the scope of employment. See *Local 11, supra*, 242 F.2d 932, 936 (C. A. 6); Judge Prettyman's dissenting opinion herein, p. 20, *infra*.[6]

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

JEROME D. FENTON,
General Counsel,
STEPHEN LEONARD,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
NORTON J. COME,
Attorney,
National Labor Relations Board.

JULY 1957.

---

[6] Congress "used this phrase only to distinguish between employees in their capacity as employees and employees in their capacity as consumers." *Local 1976, United Brotherhood of Carpenters (Sand Door)*, 113 N. L. R. B. 1210, 1217.

APPENDIX

1. *Opinion of Court of Appeals*

United States Court of Appeals for the District of Columbia Circuit

No. 13394

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 13406

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITIONS TO REVIEW AND SET ASIDE, AND ON REQUEST FOR ENFORCEMENT OF, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Decided May 9, 1957

Before PRETTYMAN, WASHINGTON and BASTIAN, Circuit Judges

BASTIAN, Circuit Judge: These cases involve the issue as to whether or not the so-called "hot cargo" clause[1] in a labor contract, wherein an employer

[1] The "hot cargo" clause in question reads: "(a) The Union and the Employer agree that it shall not constitute a breach of this Agreement for any employee or Union member cov-

agrees that his employees shall not be required to handle struck goods, is enforceable by the union party thereto, and whether it (the hot cargo clause) may be used as an excuse by a union on strike to conduct secondary picketing.

The facts found by the Trial Examiner and the majority of the National Labor Relations Board are substantially as follows:

Local 850, International Association of Machinists (hereinafter called Machinists) became involved in an economic strike with the American Iron & Machine Works Company (hereinafter called American Iron) in September 1954. The strike lasted a little over a month, terminating upon the execution of a new collective bargaining agreement. During the course of the strike the Machinists picketed the three plants of their employer. They also picketed trucks of American Iron when they appeared at the loading platforms of certain carriers. Representatives of General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local 886 (hereinafter called Teamsters) instructed the unloading personnel of the carriers that, under the terms of the hot cargo clause of the contract between Teamsters and the carriers, the employees were not to handle American Iron goods since they were struck goods. Certain of the carriers, despite the hot cargo clause, requested their employees to handle American Iron goods, whereupon Teamsters urged its members employed by those carriers to refuse to handle these goods. One carrier-

---

ered herein to refuse to cross a picket line or to refuse to enter upon the premises of an Employer if such refusal does not constitute a violation of the Labor Management Relations Act of 1947. (b) Members of the Union shall not be allowed to handle or haul freight to or from an unfair company, provided, this is not a violation of the Labor Management Relations Act of 1947."

employer took no action and did not request his employees to unload.

On charges filed by American Iron, the National Labor Relations Board (hereinafter called the Board) issued complaints, filed two days after the new contract between American Iron and Teamsters was signed, against both Teamsters and Machinists by reason of the alleged violation of Section 8 (b) (4) (A) of the National Labor Relations Act, as amended.[2] A temporary injunction applied for by the Board was denied by the United States District Court for the Western District of Oklahoma.

The complaints of the Board were referred to a Trial Examiner and, after a preliminary report and consideration of the exceptions thereto, the Board, by a majority vote, two of the five members dissenting, directed that Machinists and Teamsters cease and desist from inducing or encouraging the employees of the carriers, or any other employer, to engage in a strike or concerted refusal in the course of their employment to work on or handle freight consigned to or received from American Iron, or any other employer, where an object thereof was to force or require

---

[2] 61 Stat. 141 (1947): "(b) It shall be an unfair labor practice for a labor organization or its agents * * * (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *."

any employer or person to cease doing business with American Iron. Two of the three members of the majority of the Board were of opinion that the hot cargo clause was valid; the third member, concurring in the result of the Board's order, was of opinion that the clause was illegal and did violence to Section 8 (b) (4) (A). The two Board members comprising the majority held in effect that, even assuming that the Act itself does not prohibit the execution of a "hot cargo" clause, nevertheless, the Act does preclude enforcement of such a clause by appeals to employees.[3]

From the order of the Board, Teamsters and Machinists filed these petitions asking this court to review and set aside the order; and, in its answer to the petitions, the Board requested that its order be enforced.

---

[3] The exact language of the Board's ruling is as follows: "* * * any direct appeal to employees by a union to engage in a strike or concerted refusal to handle a product is proscribed by the Act when one of the objectives set forth in Section 8 (b) (4) (A) is present. Thus, while Section 8 (b) (4) (A) does not forbid the execution of a hot cargo clause or a union's enforcement thereof by appeals to the employer to honor his contract, the Act does, in our opinion, preclude enforcement of such clause by appeals to employees, and this is so whether or not the employer acquiesces in the union's demand that the employees refuse to handle 'hot' goods. Accordingly, in affirming the Trial Examiner, we do not find it necessary to rely as he did, on the fact that the secondary employers herein did not acquiesce in the refusal of their employees to handle American Iron's freight. In our view, it is sufficient that there was direct inducement of such employees by Teamsters not to handle such freight, with an object of forcing the secondary employers to cease dealing with American Iron."

I

Appeal in No. 13,394

PETITION OF GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886

We agree with the four members of the Board who held that the hot cargo clause of the contract was not violative of the provisions of Section 8 (b) (4) (A) of the Act. This seems also to have been held by the Second Circuit in the so-called Conway case.[4] The majority of the Board held, following *Sand Door & Plywood Co.*, 113 N. L. R. B. No. 123, that any direct appeal to employees by a union to engage in a strike or concerted refusal to handle a product is proscribed by the Act when one of the objectives set forth in Section 8 (b) (4) (A) is present. See note 3, *supra*. With this we disagree. If the hot cargo clause is not violative of Section 8 (b) (4) (A), and we think it is not, such a ruling would in practical effect render nugatory the clause itself and would leave the employees without adequate remedy. The Board urges that Section 8 (b) (4) (A) was enacted for the benefit of the public. We think that, although the public is

[4] *Rabouin* v. *National Labor Relations Board*, 195 F. 2d 906, 912 (2d Cir. 1952). There the court said: "The union cannot have committed an unfair labor practice under this section in regard to those employers who refused to handle Rabouin's shipments under the terms of the area agreement provision relating to cargo shipped by struck employers. Consent in advance to honor a hot cargo clause is not the product of the union's 'forcing or requiring any employer * * * to cease doing business with any other person.' § 8 (b) (4) (A)." See also *Meier & Pohlmann Furniture Co.* v. *Gibbons*, 233 F. 2d 296 (8th Cir. 1956), 113 F. Supp. 409 (1953); *Madden* v. *Local 442, etc.*, 114 F. Supp. 932 (W. D. Wis. 1953).

involved, this section has for its purpose the protection of those persons who might be subjected to a secondary boycott, which is proscribed by the section.

We are not impressed with the argument that other adequate remedies are open to the employees of the union. Such remedies as are suggested by the Board seem to us to be totally inadequate and not such as are contemplated by the agreement by the employer in the hot cargo clause.

Here the Teamster's conduct only consisted of urging the employees of the carriers not to handle freight from a company which they considered unfair. This was exactly what the carriers had agreed their employees would not be required to do. If an employer may lawfully agree that its employees will not be required to handle freight from a struck company, and such a situation arises, it is hard to see how it can be said that, simply because the employees do what they have the right to do, there was a strike or refusal to work. Nor can it be said that there was a "forcing" or requiring of an employer to cease doing business with another person, because the employer was only being compelled to live up to its own voluntary contract entered into in advance of the happening.

It cannot be argued that the actions of Teamsters constituted a sympathy strike or an illegal boycott. The actions taken might have been so regarded had there been no hot cargo clause. In sympathy strikes or illegal boycotts the employers are innocent victims of disputes with which they are not concerned. But where such a clause exists a different situation arises. The secondary employer has consented, knowingly and in advance, to the refusal of its employees to handle goods of the original employer.

It seems to us that the purpose of Section 8 (b) (4) (A) is to prevent injury to secondary employers in the

disputes of others in which the secondary employers are not involved, and to prevent the forcing of such employers to stop doing business with a third person. But, in cases like this one, the secondary employer has agreed, as part of its bargaining contract with its own union, not to handle goods of an unfair employer; and it would seem that Teamsters employed the only effective means in its power to enforce the agreement.

I am authorized to state that Circuit Judge Washington agrees with the foregoing treatment of No. 13394. He is filing an additional statement.

Circuit Judge Prettyman dissents for reasons which he will state separately.

The Board's order as to Teamsters will be set aside.

II

Appeal in No. 13406

Petition of Local 850, International Association of Machinists

Machinists urge a number of objections to the Board's findings and order. Among them is that the Board erred in not holding that Teamster's conduct was protected activity and, accordingly, Machinists' conduct in bringing the dispute to the knowledge of the members of the Teamsters' Union was not in violation of Section 8 (b) (4) (A).

Machinists were not parties to the contract between the carriers and Teamsters. But they contend that, since Teamsters and the carriers were parties to a contract containing the hot cargo clause, an essential element to a finding of violation of the Act is missing. Their position is that the handling of American Iron freight (struck goods) by the employees of the carriers was taken out of the scope of their employment

by the hot cargo clause and, therefore, Machinists could induce carrier employees to exercise their contract right not to handle struck goods. Machinists urge that, since Teamsters were free to honor Machinists' ambulatory picket line, their activity would not constitute encouragement or inducement of Teamsters to engage in a concerted refusal in the course of their employment to handle the goods of another employer.

We agree with the Trial Examiner and the Board majority that the conduct of Machinists must be evaluated independently of that of Teamsters and that the defenses available to Teamsters are not automatically available to Machinists. The latter are neither parties nor third party beneficiaries of the Teamsters-carrier contract.

The Trial Examiner and the Board majority found that after picketing of American Iron trucks began, while the trucks were on the premises of the carriers, dock employees of at least some of the carriers continued to handle American Iron products. Indeed, in some instances there were protests when supervisory employees attempted to move merchandise which would ordinarily be moved by the dock employees who were members of Teamsters. The Board found further that in most instances the dock employees continued to handle American Iron freight until instructed by representatives of their union not to do so.

Here, as above stated, Machinists had no connection with the contract containing the hot cargo clause and Teamsters' contract could not constitute the basis for a defense by Machinists.

We have examined the other contentions of Machinists, among them that the Board erred in not finding that the controversy was moot because the complaint was filed after the strike between Machinists

and American Iron had been settled by execution of a new contract. A reading of the Act would indicate that a complaint may be filed where the party charged "has engaged in or is engaging" in unfair labor practices. There can be no doubt that orders dealing with unfair labor practices have preventive as well as remedial effects.

Machinists also contend that their picketing at the carriers' premises was legitimate primary activity aimed only at American Iron employees. This contention is foreclosed by the fact that the findings of the Board were based upon disputed facts; and there is substantial evidence to sustain the findings of the Board.

Circuit Judge Prettyman concurs in the result in No. 13,406 but for different reasons, which reasons he will state in a separate opinion.

Circuit Judge Washington dissents for reasons which he will state separately.

Order of Board in No. 13394 set aside.

Order of Board in No. 13406 affirmed.

PRETTYMAN, Circuit Judge, dissenting in part and concurring in part: I dissent from Judge Bastian's opinion and proposed judgment in No. 13394, relating to the Teamsters. In a nutshell my view is that the hot cargo clause cannot be enforced by a strike, because such a strike or refusal to work is flatly forbidden by Section 8 (b) (4) (A) of the Act.

A strike is a concerted refusal by employees to do work the employer wants done. This is the purport of the opinions on the point.[5] A refusal to work is likewise a declination directed at the employer. So,

[5] See Restatement, Torts § 797 (1939), and the many cases collected under "Strike" in *Words and Phrases*, especially in the pocket supplement.

if an employer and his employees agree that certain work shall not be done, and it is therefore not done, there is no "strike" or "refusal to work". Section 8 (b) (4) (A) forbids only "a strike or a concerted refusal in the course of their employment".

It follows from the foregoing that, if an employer and his employees agree by contract that the employees need not handle certain goods, and both abide by their agreement, there is no "strike" or "refusal to work." But, if an employer, having entered into such a contract, thereafter refuses to abide by his agreement and directs his employees to handle the goods, and his employees refuse to do so, there is a strike or refusal to work. Such a strike or refusal to work, where an object is to force the employer to cease transporting the products of another producer, is forbidden by the statute.

It may be that the right vouchsafed the employer by Section 8 (b) (4) (A) cannot be nullified by contract. Section 7 rights cannot be contracted away.* And it can be argued that when Congress meant Section 8 rights to be subject to contra[illegible] it said so, as it did in Section 8 (a) (3). But I need not reach that question, and, since the answer, one way or the other, involves such sweeping considerations, I do not undertake it. On the other hand it may be that the hot cargo clause is a valid contract agreement between the carriers and their employees and may validly be carried out by both parties. But even so, when a carrier refuses to comply with the contract, even though he is thereby violating the agreement, the Teamsters, his employees, may not strike or refuse to work in order to prevent the handling of the struck goods.

Nat. Licorice Co. v. Labor Board, 309 U. S. 350, 84 L. Ed. 799, 60 S. Ct. 569 (1940). See also *Bethlehem Steel Company*, 89 N. L. R. B. 341 (1950).

I think the employees may not violate the statute in order to enforce their agreement with the carrier.[7]

The sum of it is that Section 8 situations can legally be avoided, by contract or otherwise. Employers and employees need not so conduct themselves as to give rise to Section 8 prohibitions. But the terms of the statute cannot be nullified, by contract or otherwise. And so employers and employees cannot agree that even if a situation covered by the statute does occur the statute shall not apply.

I do not agree with the argument that the hot cargo clause has the effect of removing struck goods from "the course of their [the Teamsters'] employment." If such a construction could be placed upon the phrase in Section 8 (b) (4) (A), careful contract draftsmanship could legalize without qualification any otherwise prohibited activity, *e. g.*, the jurisdictional strike, the sympathy strike, and the wildcat strike, by artificially exempting the work involved from the course of the employment governed by the contract. I think the statute cannot thus be nullified.[8]

One of the carriers involved here adhered to its agreement and would not request its employees to

---

[7] Strong evidence of the public interest in the problem is afforded by the fact that the motor carrier which honors a hot cargo clause thereby violates duties owed the public, breaches other contracts, and may well be in violation of another public law, Part II of the Interstate Commerce Act, 49 Stat. 543 (1935), as amended, 49 U. S. C. A. § 301 *et seq.* See the *Examiner's Decision in Galveston Truck Line Corp.* v. *ADA Motor Lines*, I. C. C. No. MC–C–1922 (April 1957), which involves actions of our appellant Teamsters, Local No. 886, and cooperating motor carriers.

[8] The Board's rejection of this argument on another ground, *Sand Door & Plywood Co.*, 113 N. L. R. B. 1210, 1217 (1955), was cited with approval by the Sixth Circuit in *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters, Etc., et al.*, — F. 2d — (1957).

handle the goods. Its employees did not strike. So in that particular case I would not affirm the cease and desist order. As to all the other carriers I would affirm as to the Teamsters.[9].

I concur in Judge Bastian's proposed judgment in No. 13406, relating to the Machinists. I also agree with his opinion in that regard, except that I add, since as I have pointed out I think the hot cargo clause could not be enforced by a strike, that it could not have been so enforced by the Machinists even if they had been parties to the contract.

WASHINGTON, *Circuit Judge*, concurring in Judge Bastian's opinion in No. 13394, and dissenting from the latter's opinion in No. 13406:

In the *General Drivers* case, I think Judge Bastian is correct in his treatment of the "hot cargo" clause and its effect. That clause is bargained for, and must be presumed to be balanced by concessions which the employer has obtained at the bargaining table. To say that the employer is free in his discretion to recognize or ignore the clause, when a concrete problem comes up, seems to me to encourage lawlessness in industrial relations. Once a valid contract has been made—and contracts such as this have been recognized as valid by the Board and the Second Circuit—both sides are entitled to rely on the prompt and faithful execution of its provisions. I therefore agree that efforts by the Teamsters to induce their own members to abide by the terms of the "hot cargo" clause embodied in their

[9] In *National Labor Relations Board* v. *Local 1976, United Brotherhood of Carpenters, Etc., et al.*, 241 F. 2d 147 (1957), the Ninth Circuit reached the result suggested in this dissent. See also *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters, Etc., et al.*, —— F. 2d —— (6th Cir. 1957).

collective bargaining agreement are not violative of Section 8 (b) (4) (A).

The same reasoning impels me to the conclusion (in No. 13406) that the efforts of the Machinists, directed toward the same end, are similarly outside the scope of the statutory proscription. It is true that the Machinists are not a party to the contract which contains the "hot cargo" clause, and not a third-party beneficiary of it. But this does not mean that the existence of the clause has no effect on the lawfulness of the Machinists' conduct. The clause is evidence of the advance consent of the trucking companies that their employees are to refrain from handling struck goods. Because the employers have given this consent and because no basis appears in the statute for permitting this consent to be revoked on an ad hoc basis, the efforts of the contracting union (the Teamsters) to induce employees of the trucking companies to comply with the clause are upheld. The reasoning must be that what is being induced is not a "strike or refusal to work" with an object of "forcing" or "requiring" an employer to cease doing business with another person within the meaning of Section 8 (b) (4) (A). This being so, I cannot agree that what is being induced *is* within the meaning of the statute when the inducing is done by the primary employees, the Machinists. The operative effect of the employer's consent is, in my view, the same, regardless of who it is that reminds the secondary employees of the terms of their contract, and seeks to induce compliance with it.

2. *Judgment Below*

United States Court of Appeals for the District of Columbia Circuit

APRIL TERM, 1957

No. 13394

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 13406

APRIL TERM, 1957

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITIONS TO REVIEW AND SET ASIDE, AND ON REQUEST FOR ENFORCEMENT OF, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: PRETTYMAN, WASHINGTON AND BASTIAN, *Circuit Judges*

Judgment

These cases came on to be heard on the record from the National Labor Relations Board, and were argued by counsel.

On consideration whereof, It is ordered and decreed by this Court that the order of the National Labor Relations Board on review in these cases be, and it is hereby, set aside so far as it applies to General Drivers, Chauffeurs, Warehousemen, and Helpers Union, Local No. 886, and that it be, and it is hereby,

affirmed so far as it applies to Local 850, International Association of Machinists.

Pursuant to Rule 38 (1) the respondent shall within 10 days hereof serve and file a proposed enforcement decree in case No. 13406.

Dated: May 9, 1957.

Per Circuit Judge BASTIAN.

Separate opinion by Circuit Judge Prettyman dissenting with respect to case No. 13394 and concurring as to case No. 13406.

Separate opinion by Circuit Judge Washington concurring as to case No. 13394 and dissenting as to case No. 13406.

3. *Decree Below.*

United States Court of Appeals for the District of Columbia Circuit

No. 13394

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 13406

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

DECREE ENFORCING IN PART AND DENYING IN PART AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: PRETTYMAN, WASHINGTON AND BASTIAN, *Circuit Judges*

This cause came on to be heard upon the petitions of General Drivers, Chauffeurs, Warehousemen and

Helpers Union, Local No. 886, AFL–CIO (hereinafter called Teamsters) and Local 850, International Association of Machinists, AFL–CIO (hereinafter called Machinists) to review and set aside an order of the National Labor Relations Board dated March 15, 1956. The Court heard argument of respective counsel on January 11, 1957, and has considered the briefs and the transcript of record filed in this cause. On May 9, 1957, the Court being fully advised in the premises handed down its decision granting enforcement of the Board's order as to the Machinists, but denying enforcement against the Teamsters. In conformity therewith, it is hereby

Ordered, adjudged and decreed by the Court that Local 850, International Association of Machinists, AFL–CIO, and its officers, representatives, agents, successors and assigns, shall:

1. Cease and desist from inducing or encouraging the employees of Gillette Motor Transport, Inc., D. C. Hall Transport, Inc., Santa Fe Trails Transportation Company, Time, Inc., and Lee Way Motor Freight Lines, or any other employer, to engage in a strike or concerted refusal in the course of their employment to work on or handle freight consigned to or received from American Iron and Machine Works Company, or any other employer, where an object thereof is to force or to require any employer or person to cease doing business with American Iron and Machine Works Company.

2. Take the following affirmative action, which the Board has found will effectuate the policies of the National Labor Relations Act, as amended (hereinafter called the Act):

(a) Post at its business offices in Oklahoma City, Oklahoma, copies of the notice attached hereto as Appendix A. Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region of the

National Labor Relations Board, Fort Worth, Texas, after being duly signed by an official representative of the Machinists, shall be posted by the Machinists immediately upon receipt thereof, and maintained by it for a period of sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to members of the Machinists are customarily posted. Reasonable steps shall be taken by the Machinists to insure that said notices are not altered, defaced, or covered by any other material. The Machinists shall also sign copies of the notice, which the Regional Director shall submit for posting at the Oklahoma City premises of Gillette Motor Transport, Inc., D. G. Hall Transport, Inc., Santa Fe Trails Transportation Company, and Time, Inc., said employers being willing. The Machinists shall also sign a copy of the notice for posting at Lee Way Motor Freight Lines;

(b) Notify the aforesaid Regional Director in writing within ten (10) days from the date of this Decree what steps the Machinists have taken to comply herewith.

It is further hereby ordered, adjudged and decreed that those portions of the Board's order applicable to General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 886, AFL–CIO be and it hereby is set aside.

Dated: June 7, 1957.

(S) E. BARRETT PRETTYMAN,
Judge, United States Court of Appeals for the District of Columbia Circuit.

(S) GEORGE T. WASHINGTON,
Judge, United States Court of Appeals for the District of Columbia Circuit.

(S) WALTER M. BASTIAN,
Judge, United States Court of Appeals for the District of Columbia Circuit.

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to a Decree of the United States Court of Appeals for the District of Columbia Circuit, enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, we hereby give notice that:

> We will not induce and encourage the employees of any employer other than American Iron and Machine Works Company to engage in a strike or concerted refusal in the course of their employment to perform services for their employer, where an object thereof is to force or require any employer or person to cease doing business with American Iron and Machine Works Company.

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO.
(Labor Organization)

By _____
(Representative) (Title)

Dated _____

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

U. S. GOVERNMENT PRINTING OFFICE: 1957